

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CALVIN MARON ROBINSON,

Petitioner,

v.

JEFF MACOMBER, Secretary,

Respondent.

No. 1:24-cv-01394-SKO (HC)

**ORDER DIRECTING CLERK OF COURT
TO ASSIGN DISTRICT JUDGE**

**FINDINGS AND RECOMMENDATION
TO SUMMARILY DISMISS
UNEXHAUSTED PETITION**

**[TWENTY-ONE DAY OBJECTION
DEADLINE]**

Petitioner is a state prisoner proceeding pro se and in forma pauperis with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner filed the instant habeas petition on November 14, 2024, challenging his 2022 conviction for shooting at an inhabited dwelling and related firearm offenses. Because the petition appears to be unexhausted, the Court will recommend it be DISMISSED without prejudice.

DISCUSSION

A. Preliminary Review of Petition

Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition if it “plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court” Rule 4 of the Rules Governing Section 2254 Cases. The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ of

habeas corpus, either on its own motion under Rule 4, pursuant to the respondent's motion to dismiss, or after an answer to the petition has been filed. Herbst v. Cook, 260 F.3d 1039 (9th Cir. 2001).

B. Exhaustion

A petitioner who is in state custody and wishes to collaterally challenge his conviction by a petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The exhaustion doctrine is based on comity to the state court and gives the state court the initial opportunity to correct the state's alleged constitutional deprivations. Coleman v. Thompson, 501 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 518 (1982).

A petitioner can satisfy the exhaustion requirement by providing the highest state court with a full and fair opportunity to consider each claim before presenting it to the federal court. Duncan v. Henry, 513 U.S. 364, 365 (1995). A federal court will find that the highest state court was given a full and fair opportunity to hear a claim if the petitioner has presented the highest state court with the claim's factual and legal basis. Duncan, 513 U.S. at 365 (legal basis); Kenney v. Tamayo-Reyes, 504 U.S. 1, 112 S.Ct. 1715, 1719 (1992) (factual basis).

Additionally, the petitioner must have specifically told the state court that he was raising a federal constitutional claim. Duncan, 513 U.S. at 365-66. In Duncan, the United States Supreme Court reiterated the rule as follows:

In Picard v. Connor, 404 U.S. 270, 275 . . . (1971), we said that exhaustion of state remedies requires that petitioners “fairly presen[t]” federal claims to the state courts in order to give the State the “opportunity to pass upon and correct alleged violations of the prisoners' federal rights” (some internal quotation marks omitted). If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution. If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court.

Duncan, 513 U.S. at 365-366. The Ninth Circuit examined the rule further, stating:

Our rule is that a state prisoner has not “fairly presented” (and thus exhausted) his federal claims in state court *unless he specifically indicated to that court that those claims were based on federal law*. See Shumway v. Payne, 223 F.3d 982, 987-88 (9th Cir. 2000). Since the Supreme Court's decision in Duncan, this court has held that the *petitioner must make the federal basis of the claim explicit either by citing*

1 *federal law or the decisions of federal courts, even if the federal basis is “self-*
 2 *evident,”* Gatlin v. Madding, 189 F.3d 882, 889 (9th Cir. 1999) (citing Anderson v.
 3 Harless, 459 U.S. 4, 7 . . . (1982), or the underlying claim would be decided under
 4 state law on the same considerations that would control resolution of the claim on
 federal grounds. Hiiivala v. Wood, 195 F.3d 1098, 1106-07 (9th Cir. 1999); Johnson
v. Zenon, 88 F.3d 828, 830-31 (9th Cir. 1996);

5 In Johnson, we explained that the petitioner must alert the state court to the fact that
 6 the relevant claim is a federal one without regard to how similar the state and federal
 standards for reviewing the claim may be or how obvious the violation of federal
 law is.

7 Lyons v. Crawford, 232 F.3d 666, 668-669 (9th Cir. 2000) (italics added), *as amended by* Lyons
 8 v. Crawford, 247 F.3d 904, 904-5 (9th Cir. 2001).

9 Petitioner presents four claims based on ineffective assistance of appellate counsel. He
 10 states he has not yet sought relief in the state courts on these claims. (Doc. 1 at 12) (“All (4)
 11 grounds were not in a state or federal court.”) Because Petitioner has not exhausted these claims
 12 in the state courts, the Court must dismiss the petition without prejudice to allow Petitioner to
 13 return to state court. Raspberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006); Jiminez v. Rice,
 14 276 F.3d 478, 481 (9th Cir. 2001). The Court cannot consider claims that are entirely
 15 unexhausted. Rose v. Lundy, 455 U.S. 509, 521-22 (1982).

16 ORDER

17 IT IS HEREBY ORDERED that the Clerk of Court is DIRECTED to assign a District
 18 Judge to the case.

19 RECOMMENDATION

20 Accordingly, the Court HEREBY RECOMMENDS the habeas corpus petition be
 21 DISMISSED WITHOUT PREJUDICE for failure to exhaust state remedies.

22 This Findings and Recommendation is submitted to the United States District Court Judge
 23 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the
 24 Local Rules of Practice for the United States District Court, Eastern District of California. Within
 25 twenty-one (21) days after being served with a copy of this Findings and Recommendation, a
 26 party may file written objections with the Court and serve a copy on all parties. Id. The document
 27 should be captioned, “Objections to Magistrate Judge’s Findings and Recommendation” and shall
 28 not exceed fifteen (15) pages, except by leave of court with good cause shown. The Court will not

1 consider exhibits attached to the Objections. To the extent a party wishes to refer to any
2 exhibit(s), the party should reference the exhibit in the record by its CM/ECF document and page
3 number, when possible, or otherwise reference the exhibit with specificity. Any pages filed in
4 excess of the fifteen (15) page limitation may be disregarded by the District Judge when
5 reviewing these Findings and Recommendations pursuant to 28 U.S.C. § 636 (b)(1)(C). The
6 parties are advised that failure to file objections within the specified time may result in the waiver
7 of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th Cir. 2014). This
8 recommendation is not an order that is immediately appealable to the Ninth Circuit Court of
9 Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure,
10 should not be filed until entry of the District Court's judgment.

11
12 IT IS SO ORDERED.

13 Dated: November 20, 2024

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE